

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DAVID L. SAUER

Claimant

VS.

UNITED PARCEL SERVICE

Respondent

AND

LIBERTY MUTUAL INSURANCE CO.

Insurance Carrier

Docket No. 1,018,188

ORDER

Claimant requests review of the September 9, 2004 preliminary hearing Order entered by Administrative Law Judge Steven J. Howard.

ISSUES

The Administrative Law Judge (ALJ) found the claimant failed to sustain his burden of proof that his accidental injury arose out of and in the course of employment. The ALJ also found claimant did not comply with K.S.A. 44-534a with regard to attaching medical to the preliminary hearing application.

The claimant requests review of the following: (1) whether the claimant sustained an accidental injury arising out of and in the course of employment; and, (2) whether the claimant's evidence is admissible.

Respondent argues the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

The claimant was employed as a part-time auditing clerk for respondent. The job requires claimant to randomly select packages to confirm the weight and billing information. On July 3, 2004, while pulling a box off the conveyor belt the claimant alleged he experienced a popping sensation in his back. Claimant finished his shift and after he left work he began to experience pain through his back and neck. Claimant is alleging injury to his low back.

Claimant reported to work on July 6, 2004, but his back pain was too great to work. Claimant agreed that he told a supervisor that he had hurt himself over the weekend. It should be noted claimant has a second job with Homestead Landscaping Company where he works from 40-60 hours a week. Claimant described his job duties as taking care of their equipment and occasionally driving a dump truck. But claimant denied he worked the July 4, 2004 weekend.

Claimant went to the North Kansas City Hospital and provided the emergency room personnel a history of an unknown cause for mid back pain. Claimant agreed that he further denied a specific trauma or accident.

On July 9, 2004, claimant had a discussion with Kevin Rhine, respondent's case management supervisor. Claimant indicated that he had awakened Saturday morning with neck pain which was consistent with a prior injury claimant had suffered. But claimant never mentioned low back pain. Claimant also told Mr. Rhine he had a second job driving a truck and Mr. Rhine was under the impression claimant had performed that work over the July 4, 2004 weekend.

Claimant went to KU Midwest on July 9, 2004, with complaints of cervical and trapezius strain. Claimant was referred to Corporate Health Partners on July 12, 2004, where claimant admitted he reported awakening on the morning of July 4, 2004, with pain in his neck and back for reasons unknown. Claimant noted improvement in his neck pain but continued low back pain.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.¹ "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."²

The ALJ had the opportunity to personally observe the claimant and respondent's representative testify in person. In finding claimant did not suffer accidental injury arising

¹ K.S.A. 44-501(a).

² K.S.A. 2003 Supp. 44-508(g).

out of and in the course of employment, the ALJ apparently believed respondent's testimony over the claimant's testimony. The Board concludes that some deference may be given to the ALJ's findings and conclusions because he was able to judge the witnesses' credibility by personally observing them testify.

Moreover, the claimant initially told a supervisor that he had hurt his back over the weekend. Although claimant alleged a specific trauma with a popping in his back, the initial emergency room record indicated an unknown cause for the neck and back pain and further indicated claimant had denied a specific trauma or accident. On July 9, 2004, the claimant gave a history of pain in his neck and back for reasons unknown. The Board affirms the ALJ's finding claimant failed to establish he suffered accidental injury arising out of and in the course of his employment.

At the preliminary hearing, the respondent objected to the proceeding because no medical records were attached to the application for preliminary hearing pursuant to K.S.A. 44-534a(a)(1). The ALJ took the objection under advisement and the hearing proceeded. The ALJ's Order noted: "Claimant failed to comply with requirements of KSA 44-534a in attaching medical to the preliminary hearing application. As previously noted, the claimant's application for review listed as an issue "Whether the claimant's evidence was admissible." But that issue was not addressed in the claimant's brief to the Board. Nor is it clear from the Order that evidence was not admitted.

K.S.A. 44-534a(a)(1) requires: "Copies of medical reports or other evidence which the party intends to produce as exhibits supporting the change of benefits shall be included with the application." As previously noted it is not clear that the ALJ excluded any of the proffered records nor failed to consider the exhibits. Nonetheless, the legislature clearly did intend for the parties to provide medical records to the opposing party. The ALJ certainly would have the authority to enforce that intention by excluding records. The ALJ, likewise, has the authority to admit the records where factors favoring admission of the records outweigh the policy of prior disclosure. Because the ALJ has this discretion, the decision in this case does not exceed the ALJ's jurisdiction.

WHEREFORE, it is the finding of the Board that the Order of Administrative Law Judge Steven J. Howard dated September 9, 2004, is affirmed.

IT IS SO ORDERED.

Dated this ____ day of October 2004.

BOARD MEMBER

c: Michael H. Stang, Attorney for Claimant
Stephanie Warmund, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director